No. 90-216

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JIM BOUTON CORPORATION,

Petitioner,

—against—

WM. WRIGLEY JR. COMPANY and
AMUROL PRODUCTS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals properly reverse the District Court judgment, where the Court of Appeals found that judgment was contrary to well-settled New York contract law and based upon clearly erroneous fact-finding?

2. Does Fed. R. Civ. P. 52(a) impose an obligation on a court of appeals to accept unquestioningly a district court's factual findings, even when it finds them clearly erroneous?

DESIGNATION OF CORPORATE RELATIONSHIPS

Pursuant to Supreme Court Rule 29.1, respondents state that Wm. Wrigley Jr. Company is the corporate parent of Amurol Products Company.

TABLE OF CONTENTS

	PAGE
COUNTERSTATEMENT OF QUESTIONS PRESENTED	i
DESIGNATION OF CORPORATE RELATIONSHIPS	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	2
A. Counterstatement of the Proceedings Below	2
B. Counterstatement of the Facts	3
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. The Decision of the Court of Appeals Properly Applied the Clearly Erroneous Standard as Articulated in the Federal Rules of Civil Procedure and the Decisions of this Court	6
A. The Court of Appeals Applied the Proper Standard of Review	6
B. The Court of Appeals Properly Concluded that the District Court's Findings Were Clearly Erroneous	9
II. The Court of Appeals' Decision Was Also Required Under the New York General Obligations Law	13
III. The Exercise of this Court's Supervisory Power over the Court of Appeals Is Not Warranted in this Case for any Other Reason	15
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985)	7-8
Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69 (2d Cir. 1989)	8, 10, 12, 15-16
Bakhshandeh v. American Cyanamid, 8 A.D.2d 35, 185 N.Y.S.2d 635 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 981, 169 N.E.2d 188, 204 N.Y.S.2d 881 (1960)	13-14
Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578 (2d Cir. 1987)	9, 16
Brause v. Goldman, 10 A.D.2d 328, 199 N.Y.S.2d 606 (1st Dep't 1960), *aff'd without opinion*, 9 N.Y.2d 620, 172 N.E.2d 78, 210 N.Y.S.2d 225 (1961)	16
Cinema North Corp. v. Plaza at Latham Assoc., 867 F.2d 135 (2d Cir. 1989)	12
Comm'r v. Duberstein, 363 U.S. 278 (1960)	14
DFI Communications, Inc. v. Greenberg, 41 N.Y.2d 602, 363 N.E.2d 312, 394 N.Y.S.2d 586 (1977)	13
EDP Medical Computer Systems, Inc. v. Sears, Roebuck & Co., 149 A.D.2d 563, 540 N.Y.S.2d 18 (2d Dep't), *appeal dismissed*, 74 N.Y.2d 873, 547 N.E.2d 95, 547 N.Y.S.2d 840 (1989)	8, 16
Feick v. Fleener, 653 F.2d 69 (2d Cir. 1981)	10
Gambee v. Argendorf, 10 Misc. 2d 598, 172 N.Y.S.2d 370 (Sup. Ct. Erie Co. 1958)	16
Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709 (1986)	8

PAGE

Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1981) 8

Jim Bouton Corp. v. Wm. Wrigley Jr. Co., 902 F.2d 1074 (2d Cir. 1990) 2-6, 9-14

Lieberthal v. Sinclair Ref. Co., 130 N.Y.S.2d 454 (Sup. Ct. Nassau Co. 1954), *aff'd*, 286 A.D. 859, 143 N.Y.S.2d 644 (2d Dep't), *reh'g and appeal denied*, 286 A.D. 969, 146 N.Y.S.2d 476 (2d Dep't 1955) .. 14

Lilly v. Harris-Teeter Supermarket, 842 F.2d 1496 (4th Cir. 1988) 9

R.G. Group, Inc. v. Horn & Hardart Co., 751 F.2d 69 (2d Cir. 1984) 9, 12, 15-16

Reisler v. 60 Gramercy Park North Corp., 88 A.D.2d 312, 453 N.Y.S.2d 186 (1st Dep't 1982) 12

Reprosystem, B.V. v. SCM Corp., 727 F.2d 257 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984).....6-7, 16

Rose v. Spa Realty Assoc., 42 N.Y.2d 338, 366 N.E.2d 1279, 397 N.Y.S.2d 922 (1977) 14

Rosenzweig v. Salkind, 5 A.D.2d 58, 169 N.Y.S.2d 213 (1st Dep't 1957), *aff'd without opinion*, 5 N.Y.2d 902, 156 N.E.2d 712, 183 N.Y.S.2d 82 (1959)..... 16

Scheck v. Francis, 26 N.Y.2d 466, 311 N.Y.S.2d 841 (1970) 8, 14, 16

Schwartz v. Greenberg, 304 N.Y. 250, 107 N.E.2d 65 (1952) 10

Stetson v. Duncan, 707 F. Supp. 657 (S.D.N.Y. 1988) 10

Teachers Ins. & Annuity Ass'n of America v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987) 15

PAGE

Tebbutt v. Niagara Mohawk Power Corp., 124 A.D.2d 266, 508 N.Y.S.2d 69 (3d Dep't 1986) 16

United States v. United States Gypsum, 333 U.S. 364 (1948) 6-9

Winston v. Mediafare Entertainment Corp., 777 F.2d 78 (2d Cir. 1985).....12, 16

Wolf v. Weinstein, 372 U.S. 633 (1963) 14

Statutes

Fed. R. Civ. P. 52(a) 1, 3, 5, 7, 9, 11

N.Y. Gen. Oblig. L. § 15-301(1) 3, 11, 13

IN THE

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OCTOBER TERM, 1990

No. 90-210

JIM BOUTON CORPORATION,

Petitioner,

—against—

WM. WRIGLEY JR. COMPANY and
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The petition of Jim Bouton Corporation ("JBC") raises no more than the question of whether the United States Court of Appeals for the Second Circuit properly applied the clearly erroneous standard of review set forth in Fed. R. Civ. P. 52(a). The unanimous decision of the Court of Appeals meticulously applied that standard and found that the judgment of the District Court was clearly erroneous under well-settled New York contract law. There is simply no general issue in this case warranting the exercise of this Court's supervisory powers.

COUNTERSTATEMENT OF THE CASE

A. Counterstatement of the Proceedings Below

In March 1985, JBC brought this diversity action in the United States District Court for the Southern District of New York. JBC claimed that in 1984 JBC and respondent Amurol Products Company ("Amurol") entered into a modification of their existing trademark licensing agreement and that Amurol had breached that modified agreement.[1] After a non-jury trial, the District Court issued findings of fact and conclusions of law in which it ruled under New York law that the parties had modified their agreement and that Amurol had breached the modification agreement. *See* Pet. App. 71a-82a.[2] The District Court awarded JBC nearly $1 million in additional royalties plus interest, and granted a permanent injunction enforcing a non-competition provision that the court found was part of the modification agreement. Pet. App. 94a-96a. The District Court also awarded damages for violations of that judicially crafted non-competition provision. *Id.*

The Court of Appeals reversed the District Court judgment, holding that (1) the writings JBC contended constituted the modification agreement were not sufficient to satisfy the requirement in the existing trademark licensing agreement that a modification could be effected only by an "agreement in writing" (902 F.2d at 1080; Pet. App. 15a); (2) those same

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1 Amurol's corporate parent Wm. Wrigley Jr. Company ("Wrigley"), which JBC also sued, was dismissed as a defendant by the District Court and JBC did not appeal that disposition. Wrigley did not participate in the proceedings in the Court of Appeals and is not a respondent in this Court. JBC's identification of Wrigley as a respondent in the caption of its Petition for Writ of Certiorari is erroneous.

2 Citations to the District Court's unreported opinion are to the petitioner's appendix ("Pet. App."), attached to its Petition for Writ of Certiorari ("Pet."). *See* Pet. App. 20a-96a. Citations to the Court of Appeals' opinion are to both the reported opinion and the petitioner's appendix. *See Jim Bouton Corp. v. Wm. Wrigley Jr. Co.*, 902 F.2d 1074 (2d Cir. 1990); Pet. App. 1a-19a.

writings did not meet the requirements of section 15-301(1) of New York's General Obligations Law that a written contract prohibiting oral modifications "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement is sought or by his agent" (902 F.2d at 1080; Pet. App. 16a-17a); and (3) under well-settled New York common law contract principles, the parties had exhibited an intent not to be bound except by a formal agreement signed by the parties and that no such writing had ever come into being (902 F.2d at 1081; Pet. App. 16a-17a). Any of these three bases for the Court of Appeals' disposition alone would have been sufficient to reverse the District Court's judgment.

In reaching its decision, the Court of Appeals carefully reviewed the record as a whole, applied the clearly erroneous standard pursuant to Fed. R. Civ. P. 52(a), and found that it had a "definite and firm conviction that the district court erred in holding" that the parties had entered into a binding modification agreement. 902 F.2d at 1080; Pet. App. 15a.

B. Counterstatement of the Facts

Respondent Amurol is a manufacturer of candy, gum, and other food and novelty products. Pet. App. 24a-25a. Since 1980, Amurol has sold a shredded bubble gum in a pouch product marketed under the trademark "Big League Chew," which it licenses from JBC. Pet. App. 29a. By 1984 the parties' "Big League Chew" relationship had been governed by three successive formal, written trademark licensing agreements, the most recent being the so-called 1981 Agreement, under which JBC received a 2½% royalty for the use of its trademark. Pet. App. 29a-40a. As with the two predecessor contracts, the 1981 Agreement explicitly provided that no modifications were permitted "except by an agreement in writing." Pet. App. 38a-39a.

A dispute arose in early 1984 over JBC's refusal to approve certain advertising. Pet. App. 46a-47a. The parties had a series of telephone conversations and one exchange of

correspondence in February 1984 looking toward a possible contractual modification to deal with the problem. Pet. App. 47a-54a. The proposals being discussed would have doubled JBC's royalty to 5% in exchange for JBC's relinquishing any right to approve advertising (Pet. App. 53a-54a); Amurol would also have agreed not to introduce another shredded bubble gum in a pouch that would compete with Big League Chew (Pet. App. 49a).

On February 22, 1984 Amurol's president dispatched a mailgram summarizing some, but not all, of the terms the parties understood would be part of any final agreement. *See* Pet. App. 49a (text of mailgram). Most prominently, the mailgram did not mention the 5% royalty provision that JBC sought.[3] *Id.*; *see* 902 F.2d at 1076, 1077, 1080; Pet. App. 5a, 7a-8a, 15a. The mailgram also clearly stated that Amurol would ask its lawyer to prepare "final papers." Pet. App. 49a.

On February 28, 1984 JBC's attorney sent a letter to Amurol in which he acknowledged that the mailgram only contained "[p]art of the understanding" between the parties and in which he added certain additional conditions upon which any final agreement was to be predicated. 902 F.2d at 1077; Pet. App. 7a (text of letter). Specifically, the February 28 letter added the 5% royalty term that had been left out of the mailgram and made additional counter-proposals regarding package graphics and use of the exterior of the package to sell other products. *Id.* The language of the February 28 letter, drafted by JBC's own lawyer, was hardly the language of a lawyer confirming the existence of a binding agreement. The letter concluded:

> If your understanding comports with the above, *we will operate on the assumption that an acceptable writing will come into being* and, on behalf of the Jim Bou-

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3 Although JBC's petition repeatedly refers to the mailgram as containing the terms of the parties' supposed agreement (Pet. 13-15, 23-24), nowhere does the petitioner acknowledge that the mailgram lacked the crucial royalty provision.

> ton Corporation, I hereby give Amurol authorization to run the TV ad *for 1984*.

Id. (emphasis added). The letter granted permission to run the disputed advertisement only in 1984, and did not purport to yield JBC's approval over advertising for the duration of the 1981 Agreement. 902 F.2d at 1077; Pet. App. 8a.

Immediately following that exchange of correspondence and for nine months thereafter, the lawyers for both parties worked at drafting a binding contractual modification. Pet. App. 57a. Proposals and counter-proposals were exchanged, but no final agreement was ever reached. *Id.* In particular, the parties were never able to agree on what limitations should be placed on Amurol's right to introduce another shredded bubble gum. *Id.* Throughout this nine-month period of active negotiations, neither JBC nor its attorney resisted the continuing negotiations on the ground that a binding modification had already been reached in February. *See* 902 F.2d at 1080; Pet. App. 15a. JBC first made such a claim only well after the fact—when the negotiations broke down in failure at the end of 1984. *See* Pet. App. 63a.

SUMMARY OF ARGUMENT

In its review of the fact determinations of the District Court, the Court of Appeals properly applied the clearly erroneous standard set out in Rule 52(a) of the Federal Rules of Civil Procedure. Upon review of the evidence as a whole the Court of Appeals found that the trial judge committed clear error by ignoring or misconstruing undisputed documents and facts contained in the record. The Court of Appeals found that the record as a whole required a finding that the parties had not entered into a binding contractual modification under controlling New York law. A proper application of the correct standard of review by the Court of Appeals does not warrant this Court's review.

ARGUMENT

I. The Decision of the Court of Appeals Properly Applied the Clearly Erroneous Standard as Articulated in the Federal Rules of Civil Procedure and the Decisions of this Court

JBC's only basis for invoking this Court's power of review is its claim that the Court of Appeals mechanistically invoked the clearly erroneous standard of review (Pet. 20), flouted that standard (Pet. 36) and in fact reviewed the case *de novo* (Pet. 20). In reality, JBC's complaint is that it disagrees with the conclusion the Court of Appeals reached after properly applying the clearly erroneous standard of review.

A. The Court of Appeals Applied the Proper Standard of Review

This case does not involve abusive or improper review. A unanimous Court of Appeals found that its "review of the record, much of which is in the form of written documents, leaves us with the definite and firm conviction that the district court erred in holding [that a binding agreement had been entered into]. *See Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 261 (2d Cir.), *cert. denied*, 469 U.S. 828 (1984)." 902 F.2d at 1080; Pet. App. 15a. The "definite and firm conviction" language used by the Court of Appeals comes from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), which, like *Reprosystem*, applied the "clearly erroneous" standard.[4]

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4 In *Reprosystem*, just as in the present case, the Court of Appeals applied the "clearly erroneous standard of review embodied in Federal Rule of Civil Procedure 52(a)" to reverse a finding by the District Court that the parties had entered into a binding contract. 727 F.2d at 261. The court in *Reprosystem* articulated that standard as follows: "the district court's finding that the parties intended to be contractually bound prior to execution of the formal contracts must be upheld unless it was made without adequate evidentiary support, is against the

Under Fed. R. Civ. P. 52(a), "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564 (1985), this Court explained in detail that although the meaning of the phrase "clearly erroneous" in Rule 52(a) is not immediately apparent, certain general principles apply. First among those is the principle articulated in *United States Gypsum* "that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *Anderson*, 470 U.S. at 573 (quoting *United States Gypsum*, 333 U.S. at 395). That is precisely the standard applied by the Court of Appeals in the present case.

The petitioner attempts to assert that the Court of Appeals failed to give adequate consideration to "credibility determinations" made by the District Court. But in *Anderson* itself, this Court cautioned:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it. Where such factors are present, the Court of Appeals may well find clear error even in a finding purportedly based on a credibility determination.

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clear weight of the evidence, or was induced by an erroneous view of the law." *Id.* The court's "review of the entire record" in *Reprosystem* left it "with the definite and firm conviction that a mistake was made by the district court . . . ." *Id.* (citing *United States Gypsum*, 333 U.S. at 395). This Court declined to review the Second Circuit's decision in *Reprosystem*, 469 U.S. 828 (1984).

Id. at 575; *see also United States Gypsum*, 333 U.S. at 396.[5]

This case was a particularly appropriate one for the Court of Appeals to rely upon documentary evidence. Under New York law, the parties' intent to be bound is not to be determined by assessing subjective assertions of intent, such as those that would come from the self-serving trial testimony of the contracting parties. Rather, New York courts have long maintained that objective manifestations of intent—especially the parties' behavior around the time the contract was allegedly formed as exemplified in written documents—provide the most reliable indication of the parties' intent. *See, e.g., Scheck v. Francis*, 26 N.Y.2d 466, 470, 260 N.E.2d 493, 494-95, 311 N.Y.S.2d 841, 843 (1970) (per Fuld, C.J.) (intent not to be bound determined based on writings before the court alone); *EDP Medical Computer Systems, Inc. v. Sears, Roebuck & Co.*, 149 A.D.2d 563, 564, 540 N.Y.S.2d 18, 19-20 (2d Dep't) (intent not to be bound determined based on "written exchanges between the parties"), *appeal dismissed*, 74 N.Y.2d 873, 547 N.E.2d 95, 547 N.Y.S.2d 840 (1989). Under New York law, the after-the-fact testimony of parties about what they had in mind at the time is given little weight when compared with the parties' objectively determinable actions at the time. *See id.*; *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 72 (2d Cir. 1989) (where lan-

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5 Plaintiff relies on this Court's decisions in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1981), to bolster its claim that the Court of Appeals applied an improper standard of review. Neither of those cases is applicable. In *Icicle Seafoods*, the Court of Appeals, functioning under an erroneous interpretation of earlier cases decided by this Court, explicitly applied a *de novo* standard of review when it should have applied the clearly erroneous standard. 475 U.S. at 712-13. In *Inwood Laboratories*, the Court of Appeals weighed the evidence differently than the district court, but never found that the district court committed clear error. 456 U.S. at 853. Neither of those cases applies here, where the Court of Appeals openly relied on the clearly erroneous standard and properly found that the District Court had committed clear error. *See id.* at 864 (Rehnquist, J.) (concurring in the result).

guage of documents supposedly constituting an agreement is clear, no need to look at other indications of parties' intent not to be bound); *see also Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 590 (2d Cir. 1987); *R.G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 74 (2d Cir. 1984).

In this case, the Court of Appeals discussed the evidence extensively, weighed it as a whole, and then unanimously found that the District Court's findings were clearly in error. The District Court could not explain why the central 5% royalty term was missing from the mailgram, why JBC's lawyer needed to send the February 28 letter if the mailgram already constituted a contract, and why the parties negotiated for nine months after the mailgram was sent if they already had a contract. 902 F.2d at 1080; Pet. App. 15a. In short, the Court of Appeals acted well within the bounds of the standard of review articulated in Rule 52(a) and explained in *Anderson*.[6]

B. The Court of Appeals Properly Concluded that the District Court's Findings Were Clearly Erroneous

The application of the clearly erroneous standard in this case presents no general issue that warrants this Court's review. Moreover, the Court of Appeals' ultimate conclusion was correct: as a matter of New York contract law, the parties did not enter into a binding contractual modification and the District Court was clearly wrong in finding to the contrary. Under New York law, it is clear that even if parties negotiating a proposed agreement come to an "understanding" as to the terms of their agreement, they will not be bound by that understanding until they have reached a final

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6 Contrary to JBC's contention (Pet. 11), the clearly erroneous standard of review does not impose an "obligation" on a court of appeals to acquiesce unquestioningly in the findings of the district court. *See, e.g., United States Gypsum*, 333 U.S. at 396; *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1505 (4th Cir. 1988) (clear error can be found when credibility determinations are contradicted by documentary or objective evidence).

agreement that they intend to be binding. *See Arcadian Phosphates*, 884 F.2d at 70; *Feick v. Fleener*, 653 F.2d 69, 79 (2d Cir. 1981); *Schwartz v. Greenberg*, 304 N.Y. 250, 253-54, 107 N.E.2d 65, 66-67 (1952). This principle has been consistently applied by the New York courts and by federal courts interpreting New York law. *E.g.*, *Arcadian Phosphates*, 884 F.2d at 72-73 (and cases cited therein); *Stetson v. Duncan*, 707 F. Supp. 657, 665 (S.D.N.Y. 1988).

In applying this settled rule of state contract law, the Court of Appeals decision noted several undisputed facts that it found dispositive: (1) the parties had previously indicated their intent to require any modification of their existing agreement to be in a written agreement by including a clause in the 1981 Agreement that said "[t]he terms of this Agreement cannot be waived or modified except by an agreement in writing." (902 F.2d at 1080; Pet. App. 15a); (2) the mailgram did not purport to be a final agreement because it lacked the critical royalty term and, on its face, looked forward to "final papers" at a future time (902 F.2d at 1076, 1080; Pet. App. 5a, 15a); (3) the February 28 letter from JBC's lawyer also did not purport to be a final agreement, but instead looked toward a future agreement and proposed additional terms for discussion (902 F.2d at 1077, 1080; Pet. App. 7a, 15a); and (4) the parties continued, for nine months after the February correspondence, to engage in vigorous negotiations that would be inexplicable if the parties had already reached a final agreement (902 F.2d at 1077-79, 1080; Pet. App. at 8a-14a, 15a).

Fully aware of these undisputed facts, the Court of Appeals "conclude[d] that the undisputed objective facts *demonstrate beyond cavil* that the parties did not intend to be bound until 'final papers' or an 'acceptable writing' was prepared and signed." 902 F.2d at 1081; Pet. App. 17a (emphasis added). The parties negotiated for nine months without agreeing to such final papers.

JBC complains, however, that the Court of Appeals placed too much emphasis on two written documents—the February

22 mailgram and the February 28 letter. Pet. 23. That argument is frivolous because, under the terms of both the 1981 Agreement and section 15-301(1) of New York's General Obligations Law, there could be no binding modification without a writing that contained the material terms of the agreement. *See* Part II, *infra*. Yet, the District Court could not point to a writing that constituted the allegedly binding agreement and JBC has vacillated on what document it believes constituted the agreement.

In its findings of fact, the District Court said the mailgram constituted the parties' understanding, but the Court never mentioned the absence of the royalty term. Pet. App. 48a-49a. In its conclusions of law, the District Court said the only possible question as to the adequacy of the mailgram under New York law was whether it "expressly or by implication" contained all the material terms of an agreement (Pet. App. 81a); but having posed the issue, never explained how the unstated royalty increase was not a material term or how it could be "implied" as part of the mailgram agreement (*see* Pet. App. 81a-82a). JBC acknowledges this failure of the trial court, but incredibly suggests that a finding that would bind the Court of Appeals under Rule 52(a) can "fairly be implied" from the District Court's opinion. Pet. 32. The Court of Appeals was entirely correct in concluding that on the critical question of whether the mailgram constituted the agreement of the parties, the District Court's opinion was "somewhat obscure." 902 F.2d at 1076; Pet. App. 5a.

JBC argues in its petition that the mailgram constituted the alleged agreement. Pet. 13-15, 23-24. In the Court of Appeals JBC abandoned a similar argument and instead claimed that an amalgam of the February 22 mailgram and the February 28 letter constituted the agreement. *See* 902 F.2d at 1080; Pet. App. 15a; *compare* 902 F.2d at 1076; Pet. App. 5a.

The Court of Appeals correctly found both the District Court's mailgram and JBC's amalgam theories to be clearly wrong. First, the February 22 mailgram failed to mention the increase in royalty—an omission the Court of Appeals

emphasized. 902 F.2d at 1076, 1077, 1080; Pet. App. 5a, 7a-8a, 15a. Second, the February 28 letter (1) explicitly acknowledged that the mailgram contained only part of the terms of an agreement; (2) stated that the advertising approval was for the year 1984 only; and (3) proposed additional terms and conditions that were to be part of any final agreement. 902 F.2d at 1077; Pet. App. 7a-8a.

Finally, JBC also argues that the Court of Appeals failed to give adequate consideration to the District Court's conclusion that the parties' intent to be bound in February 1984 was evidenced by their partial performance. Pet. 28-29. However, under New York law partial performance is only one of several factors to be weighed in determining whether the parties intended to enter into a contract.[7] Even with respect to partial performance, New York courts require that any performance be "unequivocally referable" to the alleged agreement. *Cinema North Corp. v. Plaza at Latham Assoc.*, 867 F.2d 135, 141 (2d Cir. 1989); *Reisler v. 60 Gramercy Park North Corp.*, 88 A.D.2d 312, 316-17, 453 N.Y.S.2d 186, 189-90 (1st Dep't 1982). The Court of Appeals properly applied this law, holding that the 5% royalty payments and the running of the disputed commercial cited by the District Court were not "unequivocally referable" to the alleged agreement. Rather, the alleged partial performance was equally—if not more so—referable to an arrangement to allow the use of the commercial in 1984 in return for a 5% increased royalty

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7 The Court of Appeals for the Second Circuit has summarized the factors identified by courts applying New York law in the context of contract formation disputes as (1) whether one or both of the parties expressed an intent not to be bound prior to the signing of a formal contract; (2) whether important contractual provisions remained unsettled and still to be negotiated; (3) whether the claimed agreement concerned substantial business matters and large sums of money, such that it would normally be found only in writing; and (4) the nature of any partial performance. *R.G. Group*, 751 F.2d at 74-77 (collecting cases). *See also Arcadian Phosphates*, 884 F.2d at 72; *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80 (2d Cir. 1985).

while the parties continued to try to work out a binding final agreement. 902 F.2d at 1081-82; Pet. App. 18a.[8]

II. The Court of Appeals' Decision Was Also Required Under New York's General Obligations Law

The Court of Appeals also held that under the strict requirements of section 15-301(1) of New York's General Obligations Law, the mailgram—either alone or in combination with the February 28 letter—did not meet the strict statutory requirement of an "agreement . . . in writing . . . ."[9] 902 F.2d at 1080; Pet. App. 15a-16a. The Court of Appeals concluded as a matter of law that the District Court erred in finding that section 15-301(1) had been satisfied.

New York courts have made clear that section 15-301(1) is more than a simple statute of frauds. Rather, section 15-301(1) requires that a writing possess a "level of dignity and authenticity" not required under the general statute of frauds. *DFI Communications, Inc. v. Greenberg*, 41 N.Y.2d 602, 606-07, 363 N.E.2d 312, 315, 394 N.Y.S.2d 586, 589-90 (1977). Thus, an incomplete expression of an agreement embodied in a note or memorandum or in an amalgam of writings that would satisfy the general statute of frauds is not sufficient under section 15-301(1). *See Bakhshandeh v. American Cyanamid*, 8 A.D.2d 35, 37, 185 N.Y.S.2d 635, 637 (1st Dep't 1959) (decided under predecessor statute), *aff'd*, 8

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8 JBC also argues that the Court of Appeals failed to give adequate consideration to the evidence of the parties' "course-of-dealing". Pet. 21. This is simply not the case. The parties had an unbroken history of executing formal, written agreements to govern their business relations, as the Court of Appeals expressly noted. 902 F.2d at 1075; Pet. App. 3a.

9 The statute provides: "A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, *cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought* or by his agent." N.Y. Gen. Oblig. L. § 15-301(1) (McKinney's 1978 & Suppl. 1990) (emphasis added).

N.Y.2d 981, 169 N.E.2d 188, 204 N.Y.S.2d 881 (1960). Although the District Court found that the mailgram satisfied the requirement in section 15-301(1) of an "agreement . . . in writing," Pet. App. 81a; *see also* Pet. 32, it failed to acknowledge that the mailgram did not even contain the critical royalty term and lacked any semblance of the "dignity and authenticity" required of any enforceable "agreement" under section 15-301(1).[10]

The Court of Appeals expressly noted the insufficiency of the mailgram, the February 28 letter or a combination of the two under section 15-301(1). 902 F.2d at 1080; Pet. App. 15a.[11] That conclusion, required by New York law, was an independent basis for the Court of Appeals' reversal of the District Court's judgment and itself justifies denial of JBC's petition. *See Wolf v. Weinstein*, 372 U.S. 633, 636 (1963).

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10 *See Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338, 345, 366 N.E.2d 1279, 1283-84, 397 N.Y.S.2d 922, 927 (1977); *Lieberthal v. Sinclair Ref. Co.*, 130 N.Y.S.2d 454, 457 (Sup. Ct. Nassau Co. 1954) (decided under predecessor statute), *aff'd*, 286 A.D. 859, 143 N.Y.S.2d 644 (2d Dep't), *reh'g and appeal denied*, 286 A.D. 969, 146 N.Y.S.2d 476 (2d Dep't 1955).

11 JBC argues in its petition that the question of whether the mailgram "measures up to the level of dignity and authenticity" required by the statute is one of fact. Pet. 34-35. JBC's only support for that assertion is a citation to a tax case, decided under federal law, which required a determination of whether a transfer constituted a gift. *Comm'r v. Duberstein*, 363 U.S. 278, 283-84 (1960). Determinations under section 15-301(1), however, can be resolved as questions of law under New York law. *Bakhshandeh*, 8 A.D.2d at 38, 185 N.Y.S.2d at 638 (insufficiency of documents alleged to satisfy the writing requirements of the predecessor statute to section 15-301 could be determined as a matter of law). *See also Scheck*, 26 N.Y.2d at 472, 260 N.E.2d at 495, 311 N.Y.S.2d at 845 (stating in the context of New York's less stringent statute of frauds that "[w]here the writings are plainly insufficient on their face, the conclusion follows as a matter of law, that they do not satisfy the statute of frauds").

III. The Exercise of this Court's Supervisory Power over the Court of Appeals Is Not Warranted in this Case for any Other Reason

In an effort to lend credence to its petition, JBC attempts to invoke concerns about how the conduct of business will supposedly be altered if the Court of Appeals' decision is allowed to stand. JBC argues that appeals by dissatisfied litigants will proliferate (Pet. 42-43) and uncertainty will infect the business world (Pet. 44-47) if the Court of Appeals is not reversed. The arguments are simply wrong.

First, this case involves nothing more than an application of the well-settled clearly erroneous standard. There is no risk that litigants who review the Court of Appeals' opinion will be heartened in their quest to obtain *de novo* review of their cases.

Second, the Court of Appeals' decision follows well-established New York law concerning contract formation. That underlying law forms the substantive standard which guides the conduct of business. A primary concern of New York contract law has been to " 'avoid trapping parties in surprise contractual obligations that they never intended.' " *Arcadian Phosphates*, 884 F.2d at 72 (quoting *Teachers Ins. & Annuity Ass'n of America v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987)). This view derives from New York's determination that "[i]t is important to commerce that the law make clear what force will be given to various expressions of intent, for otherwise parties could never be assured that they were, in fact, channeling their negotiations toward an oral contract or toward a written one." *R.G. Group*, 751 F.2d at 74-75.

New York has developed a law of contract formation that attempts to create certainty by allowing the parties to avoid precipitously entering into an agreement they do not yet intend to finalize. As in the present case, parties may accomplish this by reserving to themselves the right to form their contract only when a final agreement is formally signed. This is a basic principle of New York contract law, consistently

applied by New York state courts[12] and appropriately followed by numerous unanimous panels of the Court of Appeals for the Second Circuit.[13] The decision below faithfully applied this settled principle of state law.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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12 *See, e.g., Scheck*, 26 N.Y.2d at 469-70, 260 N.E.2d at 494, 311 N.Y.S.2d at 843; *EDP Medical Computer Systems*, 149 A.D.2d at 564-65, 540 N.Y.S.2d at 19-20; *Tebbutt v. Niagara Mohawk Power Corp.*, 124 A.D.2d 266, 268, 508 N.Y.S.2d 69, 70-71 (3d Dep't 1986); *Brause v. Goldman*, 10 A.D.2d 328, 332, 199 N.Y.S.2d 606, 611 (1st Dep't 1960), *aff'd without opinion*, 9 N.Y.2d 620, 172 N.E.2d 78, 210 N.Y.S.2d 225 (1961); *Rosenzweig v. Salkind*, 5 A.D.2d 58, 60, 169 N.Y.S.2d 213, 215-16 (1st Dep't 1957), *aff'd without opinion*, 5 N.Y.2d 902, 156 N.E.2d 712, 183 N.Y.S.2d 82 (1959); *Gambee v. Argendorf*, 10 Misc. 2d 598, 602, 172 N.Y.S.2d 370, 374-75 (Sup. Ct. Erie Co. 1958).

13 *Arcadian Phosphates, Inc.*, 884 F.2d at 72-73; *Best Brands*, 842 F.2d at 589-90; *Winston*, 777 F.2d at 80-84; *R.G. Group*, 751 F.2d at 74-77; *Reprosystem*, 727 F.2d at 261-63.